

Order 96-3-28

SERVED MAR 14 1996



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the **14th day of March, 1996**

**UNITED STATES-SOUTH AFRICA
FREQUENCY ALLOCATION PROCEEDING**

Docket OST-95-270

Applications of

**TRANS WORLD AIRLINES, INC.
UNITED AIR LINES, INC.**

**Dockets OST-95-189
OST-95-505**

for exemption pursuant to 49 U.S.C. section
40109 (United States-South Africa)

Application of

UNITED AIR LINES, INC.

Docket OST-95-498

for certificate pursuant to 49 U.S.C.
41102 (United States-South Africa)

**FINAL ORDER GRANTING EXEMPTIONS AND
ALLOCATING FREQUENCIES**

Summary

By this order we make final our tentative decision in Order 95-9-10, September 11, 1995, to allocate the seven weekly frequencies available for service between the United States and South Africa as follows: five weekly frequencies to World Airways, Inc. (World), and two weekly frequencies to Southern Air Transport (SAT). World proposes to operate three weekly combination and two weekly all-cargo flights between New York and Johannesburg via

Accra, Ghana.¹ SAT proposes to operate scheduled all-cargo service between Columbus and New York, on the one hand, and Johannesburg, on the other hand, via Luanda, Angola. The authority will be effective immediately for a period of one year.

Background

Aviation relations between the United States and South Africa are governed by the principles of comity and reciprocity, since there is no bilateral aviation agreement between the countries. The United States has been engaged in ongoing negotiations with the South African Government toward reaching a bilateral air services agreement. At the latest round of talks in July 1995, the South African authorities stated that, on the basis of comity and reciprocity, U.S. carriers could conduct seven scheduled weekly round-trip frequencies in the market. In this regard, South African Airways (SAA), operates a total of seven weekly South Africa-U.S. frequencies as follows: four weekly scheduled combination flights in the Johannesburg-Ilha do Sal-New York market, two weekly scheduled combination flights in the Johannesburg-Cape Town-Miami market, and one weekly “programmed” cargo charter (deemed tantamount to a scheduled service), in the Johannesburg-New York market.

At the time of the talks, USAfrica Airways, Inc., held an allocation of six of these frequencies and had provided some service in the market.² However, on February 3, 1995, USAfrica ceased all air transportation operations and filed for reorganization under Chapter 11 of the Bankruptcy Code.

The Department subsequently stated its intent to reevaluate the existing allocation of U.S. carrier frequencies in the market, and requested interested carriers to provide updated information concerning their continued interest in serving South Africa.³ Five U.S. carriers submitted responses to our letter--World Airways, SAT, USAfrica, Trans World Airlines (TWA), and United Air Lines.⁴

World reaffirmed its proposal to operate five weekly frequencies between New York and Johannesburg via Accra, Ghana, using three flights to operate combination services and two flights to operate all-cargo service. World stated that the service between New York and Accra would be operated under a code-share/blocked space arrangement with Ghana Airways. SAT proposed twice weekly all-cargo service between Columbus, Ohio, and New York, New York, on the one hand, and Johannesburg and Cape Town, South Africa, on the

¹ By Order 95-9-10, the U.S.-South Africa applications of World (formerly in Docket 49375), USAfrica (formerly in Docket 49784), and SAT (formerly in Docket OST-95-406), were consolidated into the *United States-South Africa Frequency Allocation Proceeding* (Docket OST-95-270).

² In 1992, the Department allocated USAfrica six weekly frequencies to provide scheduled combination air services in the New York-Johannesburg market via Cape Verde (see Orders 92-11-35, and 93-1-5). On June 3, 1994, USAfrica inaugurated service to South Africa with two weekly frequencies intending to phase-in additional services as traffic developed. By Notice of Action Taken dated January 11, 1995, the Department renewed the allocation of the six frequencies until January 6, 1996.

³ Letter from the Director, Office of International Aviation dated August 9, 1995, and served on all carriers that had expressed interest in serving South Africa.

⁴ See Order 95-9-10 for a complete description of these responses and their proffered service proposals.

other hand, via

Luanda, Angola. USAfrica opposed any reallocation of its frequency allocation, arguing that it intended to resume service in the market in the near future. TWA stated its continued interest in the market but did not provide a proposed startup date. United stated that it would not pursue its South Africa application at this time.

Based on the clarified operating regime resulting from bilateral negotiations, and USAfrica's cessation of operations, and in light of the information submitted by the interested carriers, we tentatively decided to reallocate the six weekly U.S.-South Africa frequencies held by USAfrica, together with one unallocated frequency, as follows: five to World and two to SAT. Order 95-9-10, September 11, 1995. Only USAfrica objected to our tentative allocation decision.⁵ On September 18, however, at the request of USAfrica, the U.S. Bankruptcy Court, District of Delaware, enjoined the Department from commencing, conducting, continuing, or prosecuting any proceeding to revoke and reallocate USAfrica's frequencies.⁶ The Department immediately appealed the Bankruptcy Court's order to the U.S. District Court in Delaware.

On January 4, 1996, USAfrica and Tower Air, Inc., filed a joint application, in Docket OST-95-270, to renew the frequency allocation due to expire January 6, 1996. The applicants requested that USAfrica's current six-flight frequency allocation be extended for 45 days, in order to permit USAfrica and Tower to complete and file a definitive route transfer agreement. The joint applicants, as part of their application, specifically requested a waiver of the 60-day advance filing requirements set forth in Part 377 of our regulations regarding the filing of renewal applications. They did so in express recognition of the fact that in the absence of action on our part to grant the application, or the waiver, by January 6, USAfrica's frequency allocation would expire by its terms. We did not act on the application or the included waiver request. We saw no public interest that would have been served in taking affirmative action that would have allowed a dormant carrier to keep unused operating rights. Thus, USAfrica's frequency allocation expired automatically by its own terms.⁷

On February 2, 1996, the District Court issued an opinion and order in favor of the Department, finding that DOT's regulation of the frequencies constituted "critical public business necessary to protect public welfare and sufficient to justify exemption from the automatic stay." Department of Transportation v. USAfrica Airways, Inc., C.A. No. 95-595 JJF. The District Court order reversed the Bankruptcy Court order and remanded the case to that Court with instructions to lift the restraining order to permit the Department to continue with the show-cause proceeding begun in Order 95-9-10. On March 13, 1996, the Bankruptcy Court advised us that an order vacating the restraining order in this matter had been signed.

⁵ United Air Lines filed an objection going to a procedural question separate from the matter of frequency allocation. We deal with United's objection below.

⁶ Southern Air Transport and World both responded on September 25 to USAfrica's objection. In light of the Bankruptcy Court's stay, we took no action on their submissions.

⁷ We will dismiss the January 4 joint application in this order. (World and SAT filed answers to the joint application. SAT accompanied its answer with a motion for leave to file an otherwise unauthorized document. We will grant the motion.)

Decision

We have decided to make final our tentative decision to grant World and SAT the exemption authority they seek to serve the U.S.-South Africa market and to allocate World five weekly frequencies and SAT two weekly frequencies for their proposed South Africa services. The authority granted will become effective immediately and will remain in effect for one year. In addition, consistent with our current practice in frequency allocation cases, we intend to subject the frequency allocations awarded here to a 90-day dormancy condition.⁸ If the flights allocated are not being used for 90 days, the frequency allocations will expire automatically and the frequencies will revert to the Department for reallocation so that they would be available for other carriers on an immediate basis should they seek to use them.

Grant of this authority to World and SAT will provide for a prompt resumption of scheduled U.S. carrier service in the South Africa market.⁹ No U.S. carrier has provided scheduled service to South Africa since USAfrica's cessation of operations in February 1995. We find that authorization of these services is consistent with the public interest.

USAfrica was the only carrier to object to our proposed allocations.¹⁰ The carrier, which has been in bankruptcy reorganization proceedings, has now notified the Department that it has "determined that it will be unable to raise sufficient new capital to enable it to emerge from bankruptcy and resume flight operations."¹¹ Therefore, we find its objections no longer pertinent to this proceeding. We are thus in a position to regard our tentative carrier selection decision as effectively unopposed. In these circumstances, the only remaining obstacle to finalizing our tentative decision was the Bankruptcy Court's injunction. As that injunction has now been vacated, we find that it is in the public interest to proceed to a final order in this matter, thereby facilitating the early resumption of U.S. carrier operations in the South African market.

We also note that the United States and South Africa have recently agreed to hold further discussions on U.S.-South Africa services in late March, in Washington, D.C. We are hopeful that these discussions will result in additional opportunities for U.S. carrier services in that market. Should this occur, we will notify all U.S. carriers of the new opportunities and invite applications from interested U.S. carriers.

⁸ See e.g., *U.S.-Russia All-Cargo Frequency Allocation Case*, Order 96-2-17.

⁹ No U.S. carrier currently operates scheduled service in this market. American Airlines currently holds out New York-Johannesburg scheduled combination service on a code-share basis with SAA on flights operated by SAA in the market. Three other U.S. carriers--Delta Air Lines, Inc.; United Air Lines, Inc.; and USAfrica--also hold authority to provide certain scheduled combination service to South Africa, and one U.S. carrier--Federal Express Corporation--holds authority to provide all-cargo service in the market. None of these carriers is currently serving the market. (For combination carriers, see Order 91-10-33 for Delta, Order 92-7-9 for United, and Orders 92-11-35 and 93-1-5 for USAfrica. USAfrica's certificate is suspended pursuant to section 204.7 of the Department's regulations, and became subject to revocation for dormancy on February 3, 1996. For Federal Express, see Order 95-6-26.)

¹⁰ On September 15, 1995, USAfrica filed a motion for postponement of procedural dates in this proceeding. On September 29, 1995, it withdrew that motion based on the Bankruptcy Court's issuance of the restraining order.

¹¹ See joint application of USAfrica and Tower Air dated January 4, 1996, at 6.

United's Objection

In our show-cause order we also proposed to dismiss the U.S.-South Africa applications of United Air Lines, in Dockets OST-95-498 and OST-95-505, and Trans World Airlines (TWA), in Docket OST-95-189, because neither of these carriers had immediate plans to serve South Africa. United objected to our proposed dismissal, requesting that we defer action on its U.S.-South Africa applications so that United might pursue its applications at a future date, once code-share services are permitted under our aviation relationship with South Africa.¹² Having carefully considered United's objections, and given the upcoming negotiations, and the fact that no party would be harmed by deferring action on United's applications, we have decided to grant United's request. We thus will not make final our tentative decision to dismiss United's pending South Africa applications.

ACCORDINGLY,

1. We grant World Airways, Inc., (1) an exemption to provide scheduled foreign air transportation of persons, property, and mail between New York, New York, and Johannesburg, South Africa, via the intermediate point Accra, Ghana, and (2) an allocation of five weekly roundtrip frequencies to operate this South Africa service;
2. We grant Southern Air Transport, Inc., (1) an exemption to provide scheduled foreign air transportation of property and mail between Columbus, Ohio, and New York, New York, on the one hand, and Johannesburg and Cape Town, South Africa, on the other hand, via the intermediate point Luanda, Angola; and (2) an allocation of two weekly roundtrip frequencies to operate this South Africa service;
3. The authority granted in paragraphs 1 and 2, above, will become effectively immediately and will remain in effect for one year from the service date of this order;
4. The frequencies allocated in paragraphs 1 and 2, above, will be subject to the condition that they will expire automatically and the frequencies will revert back to the Department for reallocation if they are not used for a period of 90 days;
5. To the extent that any of these operations may be conducted under an authorized code-share arrangement, the following conditions apply: the code-sharing operations must comply with 14 CFR 399.88 of the Department's regulations and any amendments to the Department's regulations concerning code-share arrangements that may be adopted and are expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in computer reservations systems and elsewhere; and that

¹² TWA did not file in response to our show-cause order. In the absence of objection on its part to our proposed action, we will dismiss its application as proposed. We emphasize that our dismissal is without prejudice to TWA's subsequent refiling for authority should it so desire.

the carrier selling such transportation accept all obligations established in its contract of carriage with the passenger (*i.e.*, the ticket); and that the operator shall not permit the code of its U.S. air carrier code-sharing partner to be carried on any flight that enters, departs, or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition;

6. We dismiss the September 29, 1995, request of USAfrica Airways, Inc., to withdraw its September 15, 1995, motion for postponement of procedural dates in this case;

7. We grant the January 19, 1996, motion of Southern Air Transport, Inc., to file an otherwise unauthorized document in OST-95-270;

8. We dismiss, without prejudice, the application of Trans World Airlines, Inc., in Docket OST-95-189;

9. We defer action on the applications of United Air Lines, Inc., in Dockets OST-95-498 and OST-95-505;

10. We dismiss, as moot, the January 4, 1996, joint application filed by USAfrica Airways, Inc., and Tower Air, Inc., in Docket OST-95-270;

11. Except to the extent granted or dismissed, we deny all remaining requests in this case;

12. We may amend, modify, or revoke this order at any time without hearing; and

13. We shall serve this order on American Airlines, Inc.; Delta Air Lines, Inc.; Federal Express Corporation; Northwest Airlines, Inc.; Southern Air Transport, Inc.; Tower Air, Inc.; United Air Lines, Inc.; Trans World Airlines, Inc.; USAfrica Airways, Inc.; World Airways, Inc., the Ambassador of South Africa in Washington, D.C., the Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration (AFS-220).

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this order is available on the World Wide Web at
<http://www.dot.gov/dotinfo/general/orders/aviation.html>*